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 Inc.*

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO/OAKLAND DIVISION**

META PLATFORMS, INC., a Delaware  
 corporation,

*Plaintiff/Counterclaim  
 Defendant,*

v.

BRANDTOTAL, LTD., an Israeli  
 corporation, and  
 UNIMANIA, INC., a Delaware  
 corporation,

*Defendants/Counterclaim  
 Plaintiffs.*

Case No.: 3:20-CV-07182-JCS

**DEFENDANTS' OPPOSED MOTION TO  
 ENLARGE TIME PURSUANT TO  
 LOCAL CIVIL RULE 6-3**

Judge: The Hon. Joseph C. Spero  
 Ctrm.: Courtroom F – 15<sup>th</sup> Floor

1 **I. INTRODUCTION**

2 Not content that BrandTotal has made the strategic decision to cease all business activity  
 3 and wind down its operations, Meta is now attempting to use its limitless resources to further  
 4 strong-arm BrandTotal into an unfavorable settlement by forcing it to respond to premature, pre-  
 5 judgment motions seeking attorneys' fee and injunctive relief without allowing BrandTotal a full  
 6 and fair opportunity to respond. These motions seek to impose massive new financial penalties,  
 7 conduct restrictions, and property disgorgements upon BrandTotal based on theories and evidence  
 8 that were not previously disclosed to BrandTotal—all before any judgment has even been entered  
 9 in this matter. In view of the new theories, evidence, and draconian relief sought in Meta's  
 10 motions, and given that BrandTotal has been focused on winding down its operations and  
 11 preparing for a scheduled mediation on August 29 intended to resolve the parties' dispute without  
 12 further judicial intervention, BrandTotal requested a modest-under-the-circumstances 30-day  
 13 extension to the deadline for its response.

14 Meta's response—which it has refused to budge from even after further compromise offers  
 15 from BrandTotal— was a miserly nine-day extension that was conditional upon BrandTotal  
 16 accepting Meta's arbitrary and unilateral decision that the hearing on these motions should be held  
 17 on September 30. BrandTotal cannot reasonably evaluate and respond to Meta's new theories,  
 18 evidence, and argument in that time frame and should not have to agree to these unacceptable  
 19 conditions. There is no urgent need to resolve these issues—to the contrary, as is explained in  
 20 more detail below, many are likely not even ripe for adjudication—and Meta had more than 2.5  
 21 months to develop its arguments after entry of the Court's Order on the parties' partial summary  
 22 judgment motions. There is no reason that BrandTotal should be prohibited from using a fraction  
 23 of that time to respond to incredibly impactful motions that seek to impose lifelong and invasive  
 24 conduct restrictions on BrandTotal and its officers and agents, in addition to financial penalties that  
 25 are almost twenty times larger than the actual damages Meta has claimed. Accordingly, and for all  
 26 the reasons set forth below and in the accompanying declaration of Kara Fussner, BrandTotal files  
 27 this opposed motion under Local Civil Rule 6-3 and asks the Court to enlarge the time for

BrandTotal’s opposition to the following motions—(1) Plaintiff Meta Platforms, Inc.’s Motion for Attorney’s Fees (ECF No. 368, “Fee Motion”) and (2) Plaintiff Meta Platforms, Inc.’s Motion for Permanent Injunction (ECF No. 367, “Injunction Motion”) (collectively, “the Motions”)—to September 30 or a date to be determined after the Court enters judgment.

## **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

The Court issued its Order on the parties’ partial summary judgment motions on May 27. In that Order, the Court granted aspects of both parties’ summary judgment motions, denied other aspects, and expressly deferred resolution of substantial legal and factual issues for subsequent proceedings. Specifically, on Meta’s breach of contract claim, the Court granted Meta summary judgment as to BrandTotal’s liability, but made clear that “the amount of any actual damages [is] to be proven at trial.” ECF No. 339 at 41. As to Meta’s Computer Fraud and Abuse Act (“CFAA”) claim and Penal Code § 502 claim (sometimes called the “CDAFA” claim), the Court granted BrandTotal’s request for summary judgment that its UpVoice 2021 data collection does *not* violate the CFAA, holding that “the statute does not encompass UpVoice 2021’s data collection, at least where it is installed by individuals who are not subject to any sort of direction by BrandTotal.” *Id.* at 43. The Court also held that BrandTotal’s accessing of non-password protected Facebook and Instagram pages did not violate the CFAA. *Id.* at 43-44. The Court applied both of these holdings in full to Facebook’s Penal Code claim, which the Court recognized as substantially “co-extensive” with Meta’s CFAA claim. *Id.* at 45.

As to Meta’s motion for summary judgment on its CFAA and Penal Code claims, the Court denied it as to CFAA entirely based on disputed issues of fact relating to damages and denied summary judgment on the merits as to substantial aspects of both of Meta’s CFAA and Penal Code claims. For example, the Court denied Meta’s summary judgment claim on the CFAA and Penal Code “[t]o the extent it seeks judgment that BrandTotal’s collection of data from panelists using UpVoice 2021, or its direct access to non-password-protected portions of Meta’s platforms violates those statutes.” *Id.* at 47. Further, the Court held that “Meta’s motion for summary judgment is DENIED as to the question of whether BrandTotal’s use of the RPE violates the CFAA or the

1 CDAFA.” *Id.* at 57. Indeed, the Court only granted summary judgment in Meta’s favor on a  
 2 narrow subset of the conduct for which Meta sought relief, and even as to that conduct made clear  
 3 that “relief [is] to be determined at trial”:

4       Meta’s motions for summary judgment is GRANTED *as to the question of whether active*  
 5 *collection of data from password-protected portions of Meta’s services by BrandTotal’s*  
 6 *legacy programs, and by BrandTotal directly*, violated the CFAA and the CDAFA. *Meta’s*  
 7 *motion is otherwise DENIED as to these claims.* Meta will be entitled to judgment in its  
 8 favor on the CDAFA claim based on its legacy programs and direct access to password-  
 9 protected material, *with relief to be determined at trial.* Meta’s CFAA claim *remains*  
 10 *contingent on showing at trial at least \$5,000 in loss caused by BrandTotal’s violations.*

11 *Id.* at 57 (emphasis added). The Court’s grant of summary judgment as to Meta’s UCL claim was  
 12 narrowly circumscribed to the same limited conduct, and the Court granted BrandTotal summary  
 13 judgment “as to a finding that its use of UpVoice 2021 does not violate the UCL.” *Id.* at 59.  
 14 Critically, the Court has not entered judgment in this action as to any of the parties’ claims.

15       Following the Court’s Order, BrandTotal repeatedly met and conferred with Meta in good  
 16 faith to resolve the outstanding issues and allow the parties to proceed with an appeal without  
 17 requiring the expenditure of resources required by a trial. While no comprehensive agreement was  
 18 reached, substantial progress was made regarding the scope of a proposed an injunction—an  
 19 agreement that Meta seemingly ignores in filing its motion for a permanent injunction that fails to  
 20 include many of BrandTotal’s revisions—the parties have been unable to agree on the scope of  
 21 damages. BrandTotal maintains that Meta’s request for millions in “unjust enrichment” is legally  
 22 improper, depends on improper methodology, and factually absurd considering that BrandTotal  
 23 was never profitable. BrandTotal’s motion to exclude the opinions of Meta’s damages expert  
 24 remains pending. ECF No. 249.

25       After several such meet and confers, Meta raised—for the first time in this litigation—its  
 26 intent to seek attorneys’ fees under the Penal Code. Meta did not even include a claim under the  
 27 California State Penal Code in its original State court complaint. Nor did Meta plead any  
 28 entitlement to attorneys’ fees in either its original or amended Federal complaint.

**III. THERE ARE NO EXIGENT CIRCUMSTANCES JUSTIFYING META’S REFUSAL TO GRANT THE REQUESTED EXTENSION AND ITS DEMAND FOR COMPRESSED BRIEFING AND HEARING SCHEDULE**

Until Meta unilaterally altered the status quo by filing the Motions, there were no significant upcoming pre-trial deadlines on the case calendar apart from the August 29 mediation. Negotiations were ongoing on remaining disputes and BrandTotal at least was optimistic that the mediation could lead to amicable resolution of the remaining issues. Trial is not set to begin until October 31. In short, BrandTotal’s requested extension would have no negative impact on the case schedule, and there is no basis in the schedule for Meta’s sudden insistence that its pre-judgment demands for attorney’s fees and injunctive relief be heard on September 30.

Meta’s proffered reasons for its sudden urgency and its refusal to grant the requested extension—(1) that BrandTotal might somehow restart its business in the interim and (2) that it might not have funds to pay Meta the attorneys’ fees to which it is purportedly “entitled”—are illogical and internally contradictory. It is undisputed and indisputable that BrandTotal has ceased all operations. *See* Injunction Motion at 13 (quoting unequivocal BrandTotal notice on website stating that “BrandTotal has ceased operating and has shut down all operations, including UpVoice, effective June 29, 2022”). Indeed, in its Fee Motion Meta flatly represented that “Meta’s summary judgment victories on the merits of its claims have...caused BrandTotal to shut down its entire scraping operation” and argued that Meta qualifies as a “prevailing party” on that basis alone. ECF No. 368 at 8 n.3. Meta’s purported concern that granting BrandTotal a modest 30-day extension for its Response to the Motions creates a risk that BrandTotal will resume operations is disingenuous and unserious.

As to the notion that BrandTotal might not have the funds sufficient to cover the attorneys’ fees to which Meta claims it is “entitled” merely because it “prevailed on its CDFA claim,” ECF No. 368 at 7, Meta knows better. BrandTotal has shared its insurance policy with Meta and there are ample funds available (i.e., several *million* remaining on the policy). Further, it would be fundamentally unjust if Meta were permitted to use the very financial difficulties it created as a sword to deny BrandTotal a full and fair opportunity to respond to Meta’s Fee Motion, which is based on a previously undisclosed legal theory and relies on over 4,000 fee entries which Meta

1 never provided to BrandTotal during prior negotiations. And while Meta apparently thinks  
 2 BrandTotal's opportunity to be heard and the Court's ultimate decision on the Fee Motion are mere  
 3 formalities that will inevitably result in a full award of the fees to which Meta is "entitled," under  
 4 the statutory provision Meta relies on Meta is not "entitled" to anything. Penal Code § 502(e)(2)  
 5 merely states that "the court *may* award reasonable attorney's fees," and courts interpreting the  
 6 provision have made it clear that such awards are only appropriate when a party's litigation  
 7 positions in Penal Code § 502 litigation are **unreasonable or frivolous**—which Meta has not even  
 8 alleged. *See Mfg. Automation & Software Sys., Inc. v. Hughes*, No. 2:16-CV-08962-CAS-KSx,  
 9 2019 WL 2396308, at \*4 (C.D. Cal. June 3, 2019), *aff'd*, 833 F. App'x 147 (9th Cir. 2021) ("...the  
 10 Court nonetheless finds that plaintiff's section 502 claim was neither frivolous nor unreasonable  
 11 and declines to award attorneys' fees to defendants under section 502(e)").

12 Finally, Meta's refusal to grant BrandTotal's modest schedule extension is particularly  
 13 improper since BrandTotal's preliminary investigation indicates that most courts would deem its  
 14 pre-judgment Fee Motion to be premature as matter of law. *See, e.g., Use Techno Corp. v. Kenko*  
 15 *USA, Inc.*, No. C-06-02754 EDL, 2007 WL 3045996, at \*2 (N.D. Cal. Oct. 18, 2007) (denying  
 16 motion for attorney's fees because "there is no entry of judgment and the case remains open and  
 17 active on the Court's docket."); *Ondersma v. Metro. Life Ins. Co.*, No. 06-cv-0258 MMC, 2007  
 18 WL 4371422, at \*9 (N.D. Cal. Dec. 12, 2007) ("To the extent plaintiff seeks fees and costs, the  
 19 request is premature because judgment has not been entered."); *Unicolors Inc. v. H & M Hennes &*  
 20 *Mauritz, L.P.*, No. 2:16-CV-02322-AB-SKx, 2018 WL 10321879, at \*1 (C.D. Cal. Apr. 25, 2018)  
 21 ("Plaintiff's motion is premature under Rule 54 because no judgment has been entered in this case.  
 22 Without a judgment, Plaintiff cannot possibly 'specify the judgment . . . entitling [it] to the  
 23 award.'" BrandTotal should not be forced to engage in expedited briefing on a claim that is not  
 24 even ripe.

25 For all the foregoing reasons, BrandTotal respectfully asks the Court to grant its requested  
 26 enlargement of time for its response to the Motions.

1 Date: August 26, 2022

Respectfully submitted,

2 By: /s/ Kara R. Fussner

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of August, 2022, I caused the foregoing to be filed electronically with the Clerk of Court and to be served via the Court's Electronic Filing System upon all counsel of record:

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